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Maria DeLourdes Steel.

Jeffrey C. Howe.

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THE UTAH COURT OF APPEALS

SCOTT KENNETH STEEL

(PETITIONER AND APPELLANT)

V.

MARIA DE LOURDES STEEL

(RESPONDENT AND APPELLEE)

BRIEF OF APPELLANT

CASE NO. 20110241-CA

Now comes Petitioner and Appellant by and through counsel, Jeffrey Howe, to appeal the determination by the 3rd District Court to dismiss the above case for lack of jurisdiction.

MARIA DE LOURDES STEEL

CIRCUITO RIO JAMAPA 8A FRACC

PLAYAS DEL CONCHAL

ALVARADO VERACRUZ ME MEXICO 95264

JEFFREY C. HOWE

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TABLE OF AUTHORITIES

CASES

Cook v. City of Moroni, 2005 UT App 40, ¶5, 107 P.3d 713

Munsee v. Munsee, 12 Utah 2d 83, 85, 363 P.2d 71 (1961)

Russell Packard Dev., Inc. v. Carson, 2005 UT 14, ¶3, 108 P.3d 741

State ex rel. W.A., 2002 UT 126, 63 P.3d 100

STATUTES

U.C.A. 1953 §30-3-1(3)

U.C.A. 1953 §78B-13-102(15)

U.C.A. 1953 §§78B-13-201(1)(a)-(d)

U.C.A. 1953 §78B-13-201(3)

U.C.A. 1953 §§78B-13-207, 208

JURISDICTIONAL STATEMENT

Jurisdiction is proper pursuant to Rule 3(a) of the Utah Rules of Appellate Procedure.

STATEMENT OF ISSUES AND STANDARD OF REVIEW

- I. Do Utah State courts have jurisdiction over parties involved in a divorce proceeding when the marriage was performed in accordance with Utah law, parties were residents of Utah at the time of the marriage and at least one party remained a Utah resident as of the date of filing for divorce?
- II. Do Utah State Courts have jurisdiction to determine child custody issues involved in a divorce proceeding where the child is not presently a resident of the State of Utah?

Standard of Review:

“The grant of a motion to dismiss presents a matter of law, which this court reviews for correctness.” *Cook v. City of Moroni*, 2005 UT App 40, ¶5, 107 P.3d 713. *See also Russell Packard Dev., Inc. v. Carson*, 2005 UT 14, ¶3, 108 P.3d 741 (“When

reviewing the propriety of a motion to dismiss, we accept the factual allegations in the complaint as true and interpret those facts and all reasonable inferences drawn therefrom in a light most favorable to the [petitioner] as the nonmoving party.”). Accordingly, the above issues are solely questions of law for the Court of Appeals to consider.

STATUTORY PROVISIONS

§ 30-3-1(2). Procedure, Residence, Grounds of Divorce

§ 78B-13-102. Definitions

§ 78B-13-201. Initial child custody jurisdiction

STATEMENT OF CASE

On December 21, 2009, Petitioner filed a Divorce Petition with the Third Judicial District Court of Salt Lake County. (R. at 1). Respondent answered on February 11, 2010. (R. at 26). On July 28, 2010, Petitioner filed a Motion for Entry of Decree of Divorce, which the court did not enforce, noting during it grant of Respondent’s Motion to Dismiss, over five months later, that it was prematurely filed. (R. at 50-51, 97). Respondent did file a Motion to Dismiss on December 14, 2010 contending that the court lacked jurisdiction over both the parties and the determination of child custody issues. (R. at 69). The District Court granted the motion, thereby entering a final Order of the Court. (R. at 97).

STATEMENT OF FACTS

Parties were married on 8/11/2003 in Salt Lake City, Utah. (R. at 1). From January 2008 to October 2008, parties resided in Mexico, near the Respondent's family. (R. at 1, 26). In October 2008, the parties separated and the Petitioner returned to reside in Utah. (*Id.*) Due to irreconcilable differences, the Petitioner filed for divorce on December 21, 2009 in the Third Judicial District Court of Salt Lake County. (R. at 1). The child affected by any custody determination has continued to reside in Mexico from the original move in January 2008. (R. at 26).

SUMMARY OF ARGUMENT

I. Utah courts have jurisdiction over this matter, as the case was commenced while the Petitioner was a qualifying resident of the state of Utah. There is no precedent that allows the court to grant a motion to dismiss simply because parties are no longer residents of the state. There is no precedent requiring that parties continuously remain resident of the state throughout the duration of divorce proceedings.

II. Utah has jurisdiction sufficient to make an initial determination of child custody because no other state, under the definition provided in the Utah Uniform Child Custody Jurisdiction and Enforcement Act has jurisdiction. Accordingly, this court should overturn the lower court's grant of Respondent's Motion to Dismiss and remand for appropriate resolution of the divorce proceeding.

ARGUMENT

I. UTAH COURTS HAVE JURISDICTION OVER THE DIVORCE OF NONRESIDENTS, PROVIDED AT LEAST ONE PARTY WAS A RESIDENT AT THE TIME OF FILING A PETITION FOR DIVORCE.

Under Utah statute, courts possess jurisdiction over nonresidents who are parties in a divorce proceeding, provided at least one party was a resident for three months prior to the time of filing. U.C.A. 1953 §30-3-1(2). Residence need not be uninterrupted, but rather the resident party must only “maintain in good faith at least a locality somewhere in [the state].” *Munsee v. Munsee*, 12 Utah 2d 83, 85, 363 P.2d 71 (1961). Further, there is no indication in relevant case law or statute that requires that the parties of a divorce remain residents of the State of Utah throughout the duration of the divorce proceedings. Accordingly, Petitioner asks the Court to not sustain the creation of procedural hurdles to the divorce proceeding that is neither supported by statute or precedent.

II. UTAH COURTS HAVE SUFFICIENT JURISDICTION UNDER THE UUCCJEA TO MAKE AN INITIAL CHILD CUSTODY DETERMINATION.

There are two basic arguments that could be raised at this point. First, that Utah does not have jurisdiction over the child and second that Utah does not have jurisdiction over the Respondent so as to alter her parental rights. Regarding the latter issue, the Utah Supreme Court is clear that if the Court has jurisdiction over the child, then the court will also have jurisdiction over the parent to the extent of being able to alter such parental rights of custody. *See State ex rel. W.A.*, 2002 UT 126, 63 P.3d 100. Whether the courts have jurisdiction over a nonresident child ancillary to a divorce proceeding is a distinct matter.

Under Utah statute, courts have jurisdiction to make an initial child custody determination if at least 1 of 4 criteria are met. U.C.A. 1953 §78B-13-201(1)(a)-(d). The criteria include: (a) this state is the home of the child or was the home of the child within 6 months prior commencing the relevant proceeding, (b) another state does not or has declined exercise of jurisdiction and “the child and at least one parent . . . have significant connection with this state” and this state has substantial evidence “concerning the child’s care, protection, training, and physical relationships,” (c) state with jurisdiction declined to exercise on grounds that this state is a more appropriate forum for such determination (see U.C.A. 1953 §78B-13-207 and 208), or (d) no state would have jurisdiction under any of the first three options. Further, personal jurisdiction over the child “is neither necessary nor sufficient to make a child custody determination.” U.C.A. 1953 §78B-13-201(3).

From the above 4 options, Petitioner stipulates that there is no basis for exercising jurisdiction under either (a) or (c), however reserves argument that this court is able to exercise jurisdiction under either option (b) or (d).


Under the Utah Uniform Child Custody Jurisdiction and Enforcement Act, “state” is defined as “a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.” U.C.A. 1953 §78B-13-102(15). From the plain language of this statutory definition, Mexico and its states do not constitute alternative states of appropriate jurisdiction for making an initial determination of child custody. From the facts presented at the court below, the child has no apparent ties to any “state”

other than Utah. Therefore, even if the court finds that this state does not have substantial evidence “concerning the child’s care, protection, training, and physical relationships,” then there would be no other “state” that has jurisdiction regarding child custody and under the fourth option, this state should exercise jurisdiction in this matter.

CONCLUSION

For the above reasons, Petitioner prays the Court to overturn the lower court’s grant of Respondent’s Motion to Dismiss and remand for appropriate resolution of the divorce proceeding.

Signed this 12th day of Sep, 2011.



Jeffrey C. Howe
Attorney for Petitioner

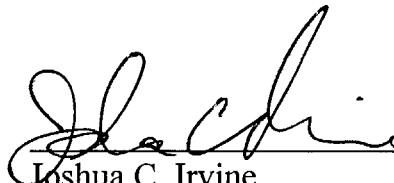
CERTIFICATE OF SERVICE

I hereby certify that on September 12, 2011, a true and correct copy/copies of the foregoing Appellant Brief was either hand-delivered or deposited in the United States mail to be delivered to:

MARIA DE LOURDES STEEL
CIRCUITO RIO JAMAPA 8A FRACC
PLAYAS DEL CONCHAL
ALVARADO VERACRUZ ME MEXICO 95264

UTAH COURT OF APPEALS
450 SOUTH STATE STREET
PO BOX 140230
SALT LAKE CITY, UTAH 84114

-Signed this 12th day of September, 2011.


Joshua C. Irvine
Law Clerk – Petitioner's Attorney

ADDENDUM A

FINAL ORDER GRANTING RESPONDENT'S MOTION TO DISMISS

**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH**

SCOTT KENNETH STEEL,

Petitioner,

vs.

MARIA DE LOURDES STEEL,

Respondent.

MINUTE ENTRY

Case No. 094905472

January 3, 2011

Judge Sandra Peuler

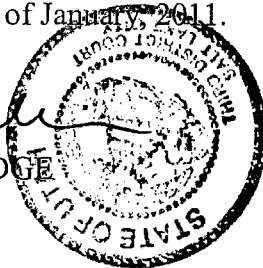
Before the Court is respondent's motion to dismiss this divorce action without prejudice. The Court notes that petitioner has failed to respond to the motion; and, although the request to submit was filed prematurely, it appears that as of this date, the time has expired for petitioner to do so. It also appears that neither party resides in Utah, and that Utah lacks jurisdiction to determine child issues. Accordingly, the respondent's motion is granted.

This action is dismissed without prejudice.

This Minute Entry is the final Order of the Court, and no additional order is required to be prepared in the matter.

DATED this 3 day of January, 2011.

Sandra Peuler
DISTRICT COURT JUDGE



ADDENDUM B
DETERMINATIVE STATUTES

§ 30-3-1(2). Procedure, Residence, Grounds [for/of Divorce]

(2) The court may decree a dissolution of the marriage contract between the petitioner and respondent on the grounds specified in Subsection (3) in all cases where the petitioner or respondent has been an actual and bona fide resident of this state and of the county where the action is brought, or if members of the armed forces of the United States who are not legal residents of this state, where the petitioner has been stationed in this state under military orders, for three months next prior to the commencement of the action.

§ 78B-13-102. Definitions

As used in this chapter:

(15) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

§ 78B-13-201. Initial child custody jurisdiction

(1) Except as otherwise provided in Section 78B-13-204, a court of this state has jurisdiction to make an initial child custody determination only if:

(a) this state is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state;

(b) a court of another state does not have jurisdiction under Subsection (1)(a), or a court of the home state of the child has declined to exercise jurisdiction on the ground that this state is the more appropriate forum under Section 78B-13-207 or 78B-13-208; and

(i) the child and the child's parents, or the child and at least one parent or a person acting as a parent have a significant connection with this state other than mere physical presence; and

(ii) substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships;

(c) all courts having jurisdiction under Subsection (1)(a) or (b) have declined to exercise jurisdiction on the ground that a court of this state is the more appropriate forum to determine the custody of the child under Section 78B-13-207 or 78B-13-208; or

(d) no state would have jurisdiction under Subsection (1)(a), (b), or (c).

(2) Subsection (1) is the exclusive jurisdictional basis for making a child custody determination by a court of this state.

(3) Physical presence of, or personal jurisdiction over, a party or a child is neither necessary nor sufficient to make a child custody determination.